NO. 86-307

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH; JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City; JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.; BELTLINE NEWS AND ARCADE CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF PETITIONER

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EDITOR'S NOTE

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CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

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AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE CITY OF SANTA ANA

City of Paducah Public Nuisance Abatement Ordinance 83-6-2388, as to which the City of Paducah is seeking review in

its petition for writ of certiorari herein, is essentially the same ordinance as Santa Ana Public Nuisance Ordinance NS1325 which was adopted by the City of Santa ten years ago to control the obscene films being exhibited at the Mitchell Brothers' Theater in Santa Ana. Santa Ana Ordinance NS1325 enacted in 1976, has governed the actions of the Santa Ana City Council in the ten years of the City's litigation with the Mitchell Brothers' Santa Ana Theatre.

A. SANTA ANA PUBLIC NUISANCE ORDINANCE NS1325 AND PADUCAH PUBLIC NUISANCE ORDINANCE 83-6-2388 ARE IDENTICAL ORDINANCES.

Santa Ana Public Nuisance Ordinance NS1325 was drafted to control a pornographic motion picture theater business (Mitchell Brothers' Santa Ana Theater) which exhibited obscene films as its regular and only course of business, and was so limited. Paducah Public Nuisance

Ordinance 83-6-2388 contains the identical provisions on pornographic motion picture theater businesses (section 19-152) and includes an additional section (section 19-153) to control pornographic bookstore businesses which deal with the sale of "publications" and the sale and exhibition of "arcade-type films" which are defined as "publications". Santa Ana Ordinance NS1325, in its entirety, appears at Exhibit 2 to the "Motion to Allow Amicus Curiae City of Santa Ana To Argue", in Richard Arcara, District Attorney of Erie County, Petitioner v. Cloud Book Inc., etc., et al.. See motion denied in ____ U.S. ____, 89 L.Ed.2d 911, (July 7, 1986). Compare, in this regard, hereafter at Appendix (A), Santa Ana Municipal Code Sections 12-102(A) and (B) and Paducah Ordinance 83-6-2388, Sections 19-152(A), (B) and (C); Santa Ana Municipal Code Section 12-104(A) through (D)

and Paducah Ordinance 83-6-2388, Sections 19-155(A) through (D); and Santa Ana Municipal Code Sections 12-105(A)(1)and (2) with Paducah Ordinance 83-6-2388, Sections 19-156(A)(1) and (2).

B. THE PADUCAH PETITION FOR WRIT OF CERTIORARI PRESENTS THE "CLOSURE" ISSUE WHICH WAS LEFT UNANSWERED BY THIS COURT'S DECISION DURING THE 1985 TERM IN ARCARA.

The Petition for Writ of Certiorari herein presents this Court with the "Closure" question which was left unanswered by this Court's recent decision on July 7, 1986 in Arcara, District Attorney of Erie County v. Cloud Books, Inc., etc., et al., ____ U.S. ____, 54 L.W. 5060 (July 7, 1986). Arcara involved a public nuisance in the form of lewd public conduct in three (3) dimensional form, which was occurring upon the place of business known as Cloud Books Inc., a bookstore. Here, the unlawful conduct

and activities giving rise to the public nuisance abatement action, which the City Attorney was prepared to prove in the State action below and which was removed to the federal court, is the maintenance of a public nuisance in the form of a place of business in which obscene publications constitute all of the stock in trade, or a principal part of the stock in trade. See Arcara, 54 L.W. at 5061.

C. THE "CLOSURE" OR PADLOCK" OR "LICENSE REVOCATION" OF A PLACE OF BUSINESS IS NOTHING MORE THAN AN "IN REM" REMEDY IN THE FORM OF REFORMATION OF REAL PROPERTY WHICH IS A HEALTH (MORAL) PUBLIC NUISANCE.

In Arcara, the City of Santa Ana submitted an Amicus Curiae Brief in Support of the Erie County, New York District Attorney, in which it argued that New York Public Health Law, Article 23, Title II, was simply a codification of the Common Law rule that a court may assume in rem jurisdiction over real estate (the res)

which is a health menace and "reform" the property so as to eradicate the health public nuisance. See General Corporation v. State of Alabama ex rel. Sweeton, 320 So.2d 668 at 674 (1975). Sections 2320 through 2332 of the New York Public Health Law (Red Light Abatement Statute) in Arcara simply provided a formula for carrying out the process of reformation.

Amicus Curiae City of Santa Ana submits that the proper construction of the so called "closure" or "padlock" or "license revocation" remedy---and one which avoids the "red herring" which is regularly employed by those dealing in hard-core materials, is the rationale expressed by the Court of Appeal, Fourth District, in People ex rel. Hicks v. "Sarong Gals", 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (Oct. 18, 1974), hearing denied by the California Supreme Court on December 11, 1974, involving

"entertainment"; and by the Court of Appeal, First District, in People ex rel. Sorenson v. Randolph, 99 Cal.App.3d 183, 160 Cal.Rptr. 69 (Nov. 30, 1979). Those cases analyze the proceeding as an "in rem" action to reform the real property. For a "modern" adaptation of the same statute, see State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, Probable Jurisdiction Noted, 454 U.S. 1140, Appeal Dismissed on Motion of Appellant, 455 U.S. 1009, in which the Idaho Supreme Court upheld the "closure", and "padlock", stating that it was not a "prior restraint" against the person, but was instead merely an in rem punishment imposed on the property, analogous to a civil forfeiture of property used in a crime.

In People of the State of California ex rel. Hicks v. "Sarong Gals," supra, the Court was construing an application of the California Red Light Abatement Statute.

There, the trial court permanently enjoined certain parties from maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal, Fourth District analyzed the "padlock" provision as an "in rem" rather than an "in personam" remedy, and the principal objective as the reformation of the property itself.

In People of the State of California ex rel. Sorenson v. Randolph, supra, the Court of Appeal, First District, Division 1 also was construing an application of the California Red Light Abatement Statute. There, the district attorney's office had amassed considerable evidence that the premises were being used for allegedly immoral purposes; that, for example, cocktail waitresses regularly solicited acts of prostitution; that customers were

(illegally) "cadged" for drinks; that lewd acts such as masturbation were performed on customers, including police investigators; and, in general, that the ownership promoted a systematic course of illegal sexual acts such as to warrant closure of the premises as a public nuisance.

On appeal from the trial court's order of closure, the owners of "Easy Street" argued that the order of abatement unconstitutionally infringed upon its First Amendment rights as a "prior restraint" of their protected activities of showing pornographic films and nude dancing. In affirming the order of closure, at page 71, the Court of Appeal applied the same rationale as was used by the Court of Appeal in the "Sarong Gals" case noted above.

D. THE TEN YEAR HISTORY OF THE LITIGATION BETWEEN THE CITY OF SANTA ANA AND THE MITCHELL BROTHERS' THEATRE IN SANTA ANA CLEARLY ESTABLISHES THAT SANTA ANA PUBLIC NUISANCE ORDINANCE NS 1325 (AND ITS COUNTERPART PADUCAH PUBLIC NUISANCE ORDINANCE 83-6-2388) AS APPLIED, DOES NOT IMPOSE A "PRIOR RESTRAINT."

During the 1981, 1982, and 1985 October Terms of Court, Amicus Curiae City of Santa Ana, attempted, without success, to place this same so-called "closure" issue and the same basic propositions of law before this Court for resolution. The issues presented in the Santa Ana City Attorney's petitions, involving an application of Santa Ana Public Nuisance Ordinance NS 1325 to the operation of the Mitchell Brothers theater in Santa Ana, are substantially the same as the City of Paducah's petition for writ of certiorari regarding the constitutionality of Paducah Public Nuisance Abatement Ordinance 83-6-2388. See "Petition for Writ of Certiorari" in People ex rel. Cooper, City

Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1981, No. 81-271; "Petition for Writ of Certiorari" in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1982, No. 82-345; "Petitioner's Reply and Supplemental Brief" in No. 81-271; "Petitioner's Motion for Leave to File Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed," October Term 1981, No. 81-271; "Petition for Writ of Certiorari" in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1985, No. 85-439; and "Petition for Rehearing" October Term 1985, No. 85-439.

The ten year history of litigation between the City of Santa Ana and the Mitchell Brothers' Theater in Santa Ana

is set forth in a declaration of James J. Clancy, filed in such Orange County litigation, a copy of which has been filed with this Court as Exhibit 3 to Santa Ana's "Motion to Allow Amicus Curiae City of Santa Ana to Argue" in Arcara, District Attorney of Erie County, Petitioner v. Cloud Books, Inc., etc., et al., supra. A copy of said declaration is also attached as Appendix "B" to this amicus curiae brief. That history clearly establishes that Santa Ana Public Nuisance Ordinance NS 1325 has not resulted in the imposition of a "prior restraint", nor would its equivalent counterpart, Paducah Ordinance 83-6-2388.

During the above ten year period, the trial courts in 3 trials on the merits have refused to confirm the City Council's license revocation, notwithstanding those trial courts also found that all of the motion picture films which were adjudicated

(total of 51 films and 8 previews) were hard-core pornography in violation of the California State Obscenity Statutes. Further, during that period of time, the theater has continued to operate, uninterrupted, from 9:45 a.m. to midnight (12:00 a.m.) for 365 days of each of those years.

E. THE U.S. DISTRICT COURT'S HOLDING THAT A CITY DOES NOT HAVE THE POWER TO DECLAREA PLACE OF BUSINESS WHICH IS A MANUFACTORY OF OBSCENITY TO BE A PUBLIC NUISANCE IS CLEAR ERROR. THAT SAME ERROR IS THE UNDERLYING CAUSE FOR SANTA ANA'S LITIGATION PROBLEMS IN THE CALIFORNIA COURTS.

The rationale given by the trial court in each of the three cases discussed above, was the same as that given by the U.S. District Court in City of Paducah et al. v. Investment Entertainment, Inc., ie., that a City cannot declare a place of business which is alleged to be a "manufactory of obscenity" to be a public nuisance. See Petition for Writ of Certiorari, at Appendix B-12 and B-17 and B-18, reading

in part:

> "Investment does contend that Ordinance No. 83-6-2388 declares property to be a public nuisance in a way which impermissibly punishes non-obscene, protected speech. The court agrees"; and,
>
> "On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388. By going beyond the obscene materials themselves and focusing on the place where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of this focus on places rather than materials, the court finds that Section 19-152(A) and (B) and Section 19-153(A) are unconstitutional."

The federal questions have been framed in the City of Paducah's petition for writ of certiorari as follows:

> (a) Whether The City Of Paducah, Under Its Nuisance Abatement Powers, Has The Power To Enact A Procedural Public Nuisance Ordinance Which Declares A Place Of Business In Which Obscene Publications Constitute Either: (1) All Of The Stock In Trade, Or (2) A Principal Part Of The Stock In Trade, To Be A Public Nuisance Per Se; and;
>
> (b) Whether Under Such A Procedural Public Nuisance Ordinance, The City May Act To Revoke All Licenses And Permits Of Such

Business Where: (1) No Criminal Proceedings May Be Brought For Transacting Business Without A License Unless And Until The Existence Of Such Public Nuisance Has Been Established At A Trial On The Merits, And The License Revocation Confirmed By A Decree Of The McCracken Circuit Court In Judicial Proceedings Brought By The City For That Purpose, Within Five (5) Days After Passage Of Said Resolution; And Where: (2) The Trial Judge Has Equitable Discretion To Confirm Or Deny Such License Revocation?

It seems clear to Amicus Curiae City of Santa Ana that, as a matter of "hornbook law", both of the above questions must be answered in the affirmative as powers which are derived from an inherent right of government under the Common Law. Further, U.S. v. O'Brien, 391 U.S. 367 is inapposite. O'Brien has no relevancy to a City Ordinance which is directed at imposing common law sanctions on a place of business which is a "manufactory of obscene materials". By definition, such a place is a "non-expressive activity".

The unsupported assertion of the California trial courts that a City may not declare a place of business which is a "manufactory of obscenity" to be a public nuisance is a fallout resulting from "speculation" by the California Supreme Court ten years ago in its second opinion in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal.3d 42 (1976) as to what this court would decide after argument on the "closure" issue. In its first opinion in Busch, a majority of the California Supreme Court (4-3) held in 128 Cal.Rptr. at 239, in part:

> "We express no opinion upon the further question whether the Court may, in addition either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible..."
>
> "Since the United State Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before

> us, we leave the question open for further consideration."

Thereafter, however, the Court granted a rehearing and with Chief Justice Wright changing his vote to recast a 4-3 majority into a 5-2 majority, thereafter omitted the above portion of the first opinion and, in place thereof inserted the following text, in which the California Supreme Court "speculated" on what this Court would do when it faced the "closure" issue:

> "We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred to above, and at oral argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or

> theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.
>
> "We therefore hold that abatement in the present action must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (our emphasis).

Although neither the Busch trial record nor the court's opinion contemplated the validity of a city ordinance which declared a place of business which is a "manufactory of obscenity" to be a per se public nuisance, as here, the second Busch decision, with its unsupported "speculation" became the leading case authority which California Courts have followed without qualification. This has come about even though the language of the Court's first opinion, noted above,

clearly demonstrates that the rule of law expressed in the second opinion is both "dictum" and "speculation".

(F) BECAUSE OF THE CONFUSION WHICH PRESENTLY EXISTS AS TO THE LEGAL STATUS OF THE FEDERAL "CLOSURE" ISSUE, THE CITY OF SANTA ANA HAS BEEN DEPRIVED OF RESTITUTIONARY COSTS OF ABATEMENT TO WHICH IT WOULD OTHERWISE BE ENTITLED, AND ITS ABILITY TO CONTINUE TO FUND ITS PUBLIC NUISANCE ABATEMENT LITIGATION IS BEING SERIOUSLY QUESTIONED.

In the litigation with the Mitchell Brothers' Theater, the City of Santa Ana has taken the position: (1) that this Court's analysis and reasoning in Arcara v. Cloud Books, Inc., 475 U.S. ____, 87 L.Ed.2d (July 7, 1986) demonstrates that the "speculation" by the Busch Court in its second opinion (5-2) as to what this Court will hold after argument on the issue of closure of a theater which exhibits nothing but pornographic films is in error; and (2) that the California judiciary may not bar the City from making such

argument, as plaintiff is required to do in perfecting its appeal on the federal issue. See Supreme Court Practice, Stern, Gresmann and Shapiro, Sixth Edition at page 144 et seq. entitled "Need For Properly Raising A Substantial Federal Question". The note of jurisdiction in Idaho ex rel. Kidwell, 454 U.S. 1170, 71 L.Ed.2d 291, 102 S.Ct. 996; appeal dismissed on appellants' motion in 455 U.S. 1009, 71 L.Ed.2d 878, has established that the issue of closure herein is a substantial federal question.

As a result of this confusion as to the legal status of the "closure" issue, Orange County Superior Court Judge Claude D. Owens on July 31, 1986 entered an order denying the City's claim for reimbursement for costs of abatement and attorney's fees in Case No. 29-91-83 and 31-55-93, pursuant to Civil Code Section 3496. Those two trials involved 28 days

of trial and resulted in judicial findings of fact that all of the 51 motion picture films and 8 previews which were under adjudication were hard-core pornography under California Law. See, in this regard, the history of those cases set forth in Appendix B-11 through B-22 to this Amicus Curiae Brief.

Civil Code Section 3496, under which the City can claim restitution for expenditures incident to a successful abatement, provides in part, as follows:

> § ~~3496~~. (Costs and fees in obscenity cases) In any of the following described cases, the court may award costs, including the costs of investigation and discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party;
>
> (a) In any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code.

Judge Owens based his adverse ruling regarding the City's right to restitution for its costs of abatement on the fact that the City Council's license revocation, which the City had requested be "confirmed", could not be confirmed under federal law, and the City's defeat on that federal issue prevented the City from being the "prevailing party" for purpose of recovering under Civil Code Section 3496. Judge Owens ruling in that regard was:

> "In case No. 29-91-83 and 31-55-93, neither side prevailed, for both sides only partially recovered what they sought. Plaintiff succeeded in having enjoined the showing of many films. This took most of the trial time. Defendants succeeded in having the prayer for license revocation denied. Which aspect was more significant would depend upon one's point of view."

A copy of the Reporter's Transcript for July 31, 1986 is attached as Appendix "C" to this Amicus Curiae Brief.

At the present time, the City's fifth lawsuit, People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater et al., Orange County Case No. 45-80-37, involving the City's allegations that the Mitchell Brothers have been exhibiting obscene films continuously for the past ten years, is in Dept. 1 awaiting an assignment to a trial court for a hearing on a preliminary injunction against 17 programs (35 films). Also awaiting assignment are preliminary injunction hearings on the City's sixth through thirtieth lawsuits (25 weekly lawsuits, seeking an abatement of one program of 3 films, which have been filed for the 25 weeks subsequent to February 3, 1986) involving 75 films. In these lawsuits, the City is placed upon the horns of a dilemma in that, if it persists in its claims that "license revocation" under Santa Ana Ordinance NS 1325 is constitutional as applied to the Mitchell Brothers

trial facts, the City may lose its claim for reimbursement of costs of abatement under Civil Code Section 3496, as did occur in the case of Judge Claude D. Owen's ruling after trial in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theather Case No. 29-91-83 and No. 31-55-93. This dilemma has jeopardized the City's ability to continue to fund the public nuisance abatement litigation against the Mitchell Brothers' Santa Ana Theater. See the two Orange County Register News Articles dated Sunday, August 17, 1986 which reported on the present situation in Santa Ana, entitled "After 10 years, Santa Ana questions its fight" and "The Mitchell Brothers From Small-town U.S.A. to big-time pornography" at Appendix "D".

G. THE PRINCIPLES EXPRESSED BY THIS COURT IN ARCARA REQUIRE THAT QUESTIONS 2(a) AND 2(b) OF THE PADUCAH PETITION BE ANSWERED IN THE AFFIRMATIVE AS TO PADUCAH PUBLIC NUISANCE ABATEMENT ORDINANCE 83-6-2388.

Amicus Curiae City of Santa Ana contends that Chief Justice Burger's analysis in Arcara, District Attorney of Erie County v. Cloud Book, Inc. et al., 475 U.S. ____, (July 7, 1986), when considered in the light of Santa Ana Public Nuisance Abatement Ordinance NS 1325 as applied to the Mitchell Brothers' Santa Ana Theater trial facts, and its counterpart Paducah Public Nuisance Abatement Ordinance 83-6-2388, requires that Questions 2(a) and 2(b) of the City of Paducah Petition for Writ of Certiorari noted above at page 14-15 be answered in the affirmative. Amicus contends that the Arcara analysis confirms the common law principle that the license of a "manufactory of obscene materials", such as a pornographic theater or a pornographic bookstore, to operate at a specific location can be revoked by a city government on the ground that such businesses present a health (moral) public

nuisance.

In Arcara, Chief Justice Burger's analysis held that a legislative body could mandate closure (limit an equity judge's discretion) upon proof that a public nuisance, based upon lewd sexual conduct in three-dimension form, was found to exist, and that:

> "First Amendment values may not be invoked by merely linking the words 'sex' and 'books'." and
>
> "The First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." (Our emphasis).

An analogous "precedent" for the "logic" applied in the Arcara analysis can be found in the opinion of Chief Justice Bakes, speaking for a unanimous Idaho Supreme Court in Idaho ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 431. See the annotation re Idaho ex rel. Kidwell in 25 ALR 4 at 381-412, entitled

"Validity and Application of Statute Authorizing Forfeiture of Use or Closure of Real Property From Which Obscene Material Has Been Disseminated or Exhibited" and see in particular, the discussion on "Prior Restraint" at 25 ALR 4, pages 388-391.

The three-dimensional lewd conduct which was the basis for the Moral Public Nuisance and which authorized closure in Arcara has a significant impact upon the analysis of the California Supreme Court in Busch and for the following reasons: The "obscenity" (two dimensional) public nuisance analysis in Busch, 17 Cal.3d 42 (June 1, 1976), was decided by a legal analysis which is predicated upon the lewdness (three-dimensional) analogy. The Busch Court first re-affirmed its prior decision in People v. Lim, 18 Cal.2d 872, 879 (1941) which had upheld the Court of Appeal decision in Weis v. Superior Court,

30 Cal.App. 730 (1916) that an exhibition known as the "Sultan's Harem", conducted at the Panama-California International Exhibition, involving the "indecent and offensive" exposition to members of the public of the "naked persons and private parts thereof" of various female employees (in three-dimension), constituted a public nuisance subject to abatement. People ex rel. Busch, supra, 17 Cal.3d at 50. The Court then reasoned by analogy and held that there was no satisfactory distinction which would justify a differential distinction of "live" performances on the one hand (three-dimensional) and "pictorial" representations in film on the other (two-dimensional), and the presentation of either may fairly be described as "indecent" and equally injurious to public morals, People ex rel. Busch, supra, 17 Cal.3d at 50, 54. Both are "per se" public nuisances, 47

Cal.Jur.3d 214. See Busch at page 50 and 54 where the Court held:

> "While carefully noting that Weis involved live performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and 'live' performances on the other. The presentation of either may fairly be described as 'indecent' and equally injurious to public morals..."

and

> "The Court explained that 'if any semblance of civilization is retained in our country, the states must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public...'"

Applying the same analogous reasoning as was applied in Busch to Arcara, if a finding of lewd (three-dimensional) sexual conduct as a course of conduct at a specific location in Arcara can be made to "mandate" closure of the premises, then it also must follow that a finding of a course

of conduct of exhibiting nothing but obscene (two-dimensional) sexual conduct at a specific locale for ten years can authorize a judge to "confirm" a legislative ordinance which holds that such a place is a public nuisance as to which the license must be revoked.

H. THE POWER TO ABATE MORAL PUBLIC NUISANCES, BASED UPON A CONSISTENT PATTERN OF ILLEGAL ACTIVITY IN THE FORM OF EITHER "LEWD CONDUCT" OR "TRADING IN OBSCENITY", IS AN INHERENT POWER IN GOVERNMENT WHICH MAY NOT BE QUALIFIED, IF THE PUBLIC NUISANCE IS FOUND TO EXIST.

Amicus Curiae submits that the confusion which has caused several courts to error and to subject public nuisance abatement legislation involving "closure" to the O'Brien test is the common failure of most courts generally to properly analyze and give recognition to the basic principle that the power to abate moral public nuisances itself is an inherent power in government which may not be qualified if the moral public nuisance is determined to exist. If the courts of this nation are to be equipped to cope with this growing national problem of moral public nuisances, this Court's opinion must direct the attention of the judiciary

to this fundamental principle. In this regard, more than a century ago, this Court pointed out in James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance."

Even more anciently, our Anglo-Saxon legal system has described its own function as: "the Courts are the guardians of the public morals" Rex v. Curl, 2 Strange 789 (1727): Sir Charles Sedley's case 1 SID 168.

1. UNDER THE COMMON LAW AND THE STATUTORY LAW ON "NUISANCES" IN MOST STATES, THE TERM "PUBLIC NUISANCE" EMBRACES BOTH THE "MORAL" PUBLIC NUISANCE, SUCH AS TRADING IN "LEWD CONDUCT" AND/OR "OBSCENITY" WHICH IS OFFENSIVE TO THE MORAL SENSE, AND THE "PHYSICAL" PUBLIC NUISANCE WHICH IS OFFENSIVE TO ONE OF THE 5 PHYSICAL SENSES.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. At common law, both lewd conduct and trading in obscenity was regarded as a "moral" public nuisance. See H.G. Wood, the Law of Nuisances, section 57, at page 77 and section 65 at page 85:

> "57. Indecent exposure of one's person in public place, a public nuisance - As has previously been stated, anything that is offensive to the morals of society, or that is indecent, is a public nuisance. Therefore, any indecent exposure of one's person in a public place, in the presence of several persons, is a public nuisance, and indictable and punishable as such at common law. It is a nuisance because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain. . . ."

> "65. Selling obscene picture books, etc. Common nuisance - So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having them in his or her possession for the purpose of exhibition or sale may be indicted therefore at common law,

> because they are clearly in derogation of public morals and common decency. Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless 2 S and R (Penn.) 91; 7 Am. Dec. 632."

This common law rule as to moral public nuisances has been codified in most states through adoption of the Field Code in 1872. See, for example, California Civil Code sections 3479 and 3480.

2. A "MORAL" NUISANCE IS A "PER SE" PUBLIC NUISANCE. "LEWD CONDUCT" AND THE "COMMERCIAL DISTRIBUTION OR EXHIBITION OF OBSCENE MATTER" IS A PER SE PUBLIC NUISANCE (AS A MATTER OF LAW)-- NO FURTHER PROOF BEYOND THE FACT OF "LEWD CONDUCT" OR "OBSCENITY" IS REQUIRED. THE POWER TO ABATE THE SAME IS INHERENT IN GOVERNMENT, WHICH IS UNDER AN OBLIGATION TO REMOVE THE "MORAL" NUISANCE.

A "per se" public nuisance is described in 47 Cal.Jur.3d at 214, as follows:

> "Certain activities or conditions are considered nuisances under all circumstances, and are therefore termed nuisances 'per

> se' as distinguished from so - called nuisances 'in fact.' Nuisances per se are so termed because no proof is required, beyond the actual fact of their existence, to establish that they are nuisances. No proof of ill effects is necessary. . ."

See also Harris v. U.S., 315 A.2d 569 at 572 footnote 9 (February 11, 1974), wherein an en banc District of Columbia Court of Appeals, in facing a similar question, reversed the trial court judgment and defined a "nuisance per se" as a structure or activity which is a nuisance at all times and under any circumstances. Proof of the act or the existence of the structure establishes the nuisance as a matter of law.

In addressing himself to the public morals issue and the preeminent power of local government to control the same, Woods describes the danger to the environment as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood, Sections 23 and

24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."
"Section 24. Wrongs malum in se. - The class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promoition of evil manners, and anything that

> produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

The municipal power to protect the environment is inherent in government itself and is so basic that its grant of authority is said to be "implied," and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Wood, Section 743, at page 972.

> "Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given,

> the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any persons injured thereby. The common law in such a case comes in aid of the authorities and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance," Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at page 498:

> "The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is

conclusive unless it transcends the power conferred by the charter or violates the constitution."

3. MUGLER V. KANSAS, 123 U.S. 205, AUTHORIZES "CLOSURE" OF MORAL "PER SE" PUBLIC NUISANCES.

This Court has previously stated that "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . ." See James Phalen v. The Commonwealth of Virginia, supra, and that the jurisdiction of the Equity Court to deal with the same is "salutary." Mugler v. Kansas, 123 U.S. 205 (Dec. 5, 1887). In Mugler, supra, this Court specifically held that Equity Courts do have the power to enter summary interlocutory abatement "closure" orders in proper cases. There, a petition had been filed in the Kansas State Court under the thirteenth section of a statute asking (1) that a

group of buildings, constituting the brewery of the defendants, be adjudged a common nuisance, and the sheriff directed to shut up and abate the same, and (2) that the defendants be enjoined from using the premises. The petition was thereafter removed to the federal court and dismissed on the grounds that the "closure" remedy violated due process. On appeal, the U.S. Supreme Court reversed, holding at page 214:

> "Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, eq. Section 921, 922. The ground of this

> jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

4. THE CLAIM THAT THE "CLOSURE" WHICH WAS AUTHORIZED IN MUGLER V. KANSAS CANNOT BE APPLIED TO A COMMERCIAL BUSINESS WHICH HAS BEEN TRAFFICKING CONTINUOUSLY IN LEWD CONDUCT OR OBSCENITY IS A "MYTH".

The claim that the "closure" authorized in Mugler v. Kansas cannot be applied to a commercial business which is trafficking in lewd conduct or obscenity has been perpetuated by the general reluctance of this Court to de-

cide any issue in the abstract. This Court's refusal to act on the abstract issue has been full blown into a myth that has no basis in case law. See, for example, the dissent of Associate Justice White on denial of Petition for Writ of Certiorari in Avenue Book Store v. City of Tallmage, Ohio, 459 U.S. 997.

In Art Theater Guild, Inc. v. Ohio ex rel. Ewing, supra, this Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in Ohio ex rel. Ewing v. "Without A Stitch," 307 N.E.2d 911. A review of the Ohio Supreme Court decision at pages 917-918, clearly shows that an order closing a theater which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a)

appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the Court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene).

In Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, this Court again had occasion to refer to the "closure" provision of the Ohio Statute. There, the Court noted at page 497, that the narrowing construction of the Ohio Supreme Court in Ohio ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch," supra, avoided the constitutional difficulty which concerned the federal trial court in the Huffman case, and, that the case did not fit "within the exception for statutes which are flagrantly and patently violative of express consti-

tutional prohibitions.'" See also Huffman v. Pursue Ltd., supra, footnote 23 at 420 U.S. 612, which comments favorably upon the "closure" provision of the Ohio Red Light Abatement Statute, Ohio Rev. Code Section 3767.04 and Section 3767.06.

The conclusion that, under no circumstances, may a "padlock" penalty be issued does not follow from either of the above decisions. Because this Court has said that an activity is "presumptively protected" does not, in logic, require a conclusion that the presumption is conclusive! The fallacy of applying such a rule to businesses which continuously exhibit lewd "conduct" is logically demonstrated in the lengthy and comprehensive opinion of Associate Justice Burke, which Amicus Curiae recommends to the members of this Court as a classical statement in this area of the law,

speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S. 2d 857 (Mar. 26, 1964). See, for example, at page 860:

> "If we can accept the obvious -- that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946). 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S.Ct. 1304, 1324, 1 L.Ed.2d 1498)."

CONCLUSION

For the foregoing reasons, the City of Paducah et al's. Petition for Writ of Certiorari to the United States Court of Appeals for the Sixty Circuit should be granted as prayed for in the Petition.

DATED: August 26, 1986

Respectfully submitted,

EDWARD COOPER,
Santa Ana City Attorney

JAMES J. CLANCY,
Counsel of Record for
Amicus Curiae

CERTIFICATE OF SERVICE

I, hereby certify that on this 26th day of August, 1986, the original and 40 copies of the within Amicus Curiae Brief of the City of Santa Ana, California, were deposited in the United States Post Office in Sun Valley, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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City of Santa Ana

APPENDIX "A"

COMPARISON OF SANTA ANA PUBLIC NUISANCE ORDINANCE NS 1325 (INVOLVED IN SANTA ANA, CALIFORNIA PUBLIC NUISANCE LITIGATION) AND PADUCAH PUBLIC NUISANCE ORDINANCE 83-6-2388, SHOWING THE SANTA ANA AND PADUCAH ORDINANCES TO BE IDENTICAL.

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners, at page 3, line 18.)

COMPARISON OF -
SANTA ANA MUNICIPAL CODE: . . .

Section 12-102. LEWD FILMS AND THEATRES EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE; ABATEMENT THEREOF.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purposes of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section, is a public nuisance per se.

. . . AND PADUCAH ORDINANCE 83-6-2388

Section 19-152. OBSCENE FILMS AND THEATERS EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE PER SE; ADMISSION PRICE RECEIVED AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of buisness, or possessed for the purpose of such exhibition;

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

COMPARISON OF -
SANTA ANA MUNICIPAL CODE: . . .

Section 12-104. ACTION TO BE TAKEN BY CITY COUNCIL.

Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions of this ordinance to such nuisance, shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the City Council declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been

. . . . AND PADUCAH ORDINANCE 83-6-2388

Section 19-155. ACTION TO BE TAKEN BY BOARD OF COMMISSIONERS.

Upon a specific finding that a public nuisance, as defined in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, exists in the City of Paducah, the Board of Commissioners, in applying the provisions of this ordinance to such nuisance, shall provide for the following by resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the Board of Commissioners' declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been

COMPARISON OF -
SANTA ANA MUNICIPAL CODE: . . .

issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order.

Section 12-105. ACTION TO BE TAKEN BY CITY ATTORNEY.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Forthwith, but not later than five working days after passage of said Resolution, commence legal proceedings under Civil Code Sections 3491 and 3494 and Code of Civil Procedure Section 731,

issed as a part of the operation of such business, subject to confirmation by the court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the Board of Commissioners has been confirmed by judicial order.

Section 19-156. ACTION TO BE TAKEN BY DISTRICT ATTORNEY.

Upon a specific finding by resolution of the Board of Commissioners of the fact that a public nuisance exists at a particular location, the Corporation Counsel shall:

(A) Forthwith, but not later than five (5) working days after passage of said resolution, commence legal

by the filing of a civil action seeking the following relief:

(1) An Order that the motion picture or pictures named by the City Council are lewd, as defined herein;

(2) An Order that the place named by the City Council where the film or films are being exhibited is a public nuisance and that the action taken by the City Council to revoke the licenses issued to that place of business was lawful.

proceedings by the filing of a civil action seeking the following relief:

(1) an order that the subject matter identified by the Board of Commissioners in said resolution is obscene as defined herein;

(2) an order that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the licenses issued to that place of business was lawful.

APPENDIX "B"

DECLARATION OF JAMES J. CLANCY FILED ON MARCH 25, 1986 IN CASE NO. 48-49-38, SETTING FORTH THE MATTERS OF RECORD IN THE TEN YEARS OF PUBLIC NUISANCE ABATEMENT LITIGATION BETWEEN THE CITY OF SANTA ANA AND THE MITCHELL BROTHERS' SANTA ANA THEATRE.

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners, at page 12, line 10.

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Attorney for Plaintiff

FILED
MAR. 25, 1986
GARY L. GRANVILLE, County Clerk
By _____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY FOR THE CITY OF SANTA ANA, CALIFORNIA, Plaintiff, v. MITCHELL BROTHERS' SANTA ANA THEATRE located at 1565 West 17th Street, Santa Ana, County of Orange, California; CINEMA 7, INC., a California corporation, M.B.-F.G. THEATRE CIRCUIT, INC.; and DOES 1 through 5, inclusive, Defendants.	NO. 48-49-38 DECLARATION OF JAMES J. CLANCY AS TO MATTERS OF RECORD IN OTHER CASES ON FILE IN THIS COURT, IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION DATE: April 29, 1986 TIME: 9:30 a.m. DEPT: 21

DECLARATION OF JAMES J. CLANCY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

I, JAMES J. CLANCY, declare:

1. I am the attorney for the Plaintiff in the above-entitled action. I make this declaration in support of Plaintiff's Motion For a Preliminary Injunction, on file herein.

2. On November 27, 1976, People of the State of California ex rel. Gow, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., Civil Action No. 25-65-30 was filed in the Orange County Superior Court, alleging among other things that the real estate known as the Mitchell Brothers' Santa Ana Theater at 1565 West 17th Street was a public nuisance under Santa Ana Ordinance No. N.S. 1325, as amended by Ordinance No. N.S. 1452, in that the theater exhibited obscene motion pictures as a continuing course of conduct.

Although Plaintiff, in that case, alleged the manner of operating the theater involved a continuing public nuisance and that all of the films being exhibited were obscene, the trial court ruled that, for procedural purposes of trial, a cut off date would be established. (See Reporter's Transcript for January 12, 1977 at pages 65-67, line 6 and Reporter's Transcript for January 28, 1977, at page 5, lines 1-8).

3. Thereafter, and for the same procedural reasons, three additional complaints were filed to litigate the obscenity of other films being shown at the Mitchell Brothers' Santa Ana Theater, known as No. 28-12-14, No. 29-91-83 and No. 31-55-93, as follows:

CASE NO. AND FILMS INVOLVED	DATE FILED	PERIOD COVERED
25-65-30 25 programs (41 films)	11/02/76	9/3/75-4/12/77
28-12-14 12 programs (24 films)	12/20/77	4/13/77-7/15/78
29-91-83 13 programs (26 films)	10/03/78	7/16/78-10/26/78
31-55-93 26 programs (46 films)	06/21/79	11/6/78-8/21/79

total: 137 films

4. In all of the above lawsuits, Plaintiff has steadfastly contended and does now presently contend herein that Plaintiff has stated one cause of action for a continuing public nuisance. See Baker et al. v. Burbank-Glendale-Pasadena Airport, 39 Cal.3d 862, 218 Cal.Rptr. 293 (Sept. 23, 1985)

5. The titles of the 41 films in Case No. 25-65-30 are listed in the Complaint in Case No. 45-80-37 at pages 1-2

of Exhibit 3 (Surveillance Code No. 1-24). On January 12, 1977, Orange County Superior Court Judge Jerrold S. Oliver granted Plaintiff's motion to consolidate the final injunction and the preliminary injunction, which obviated the need for a separate hearing on the preliminary injunction. (See the Reporter's Transcript for January 12, 1977, referred to above, at page 71, lines 16-23). A judgment in No. 25-65-30 was filed by Judge Weeks on June 6, 1978 and thereafter, the trial court's findings in No. 25-65-30 that 11 films were obscene beyond a reasonable doubt were affirmed upon appeal. People of the State of California ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater et al., 128 Cal.App.3d 937, 940 180 Cal.Rptr. 728, 730 (1982).

6. Four appellate opinions have been filed in Case No. 25-65-30 as follows: People ex rel. Gow v. Mitchell Brothers'

et al., 114 Cal.App.3d 923, 171 Cal.Rptr. 85 (Jan. 20, 1981); reversed in California ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 454 U.S. 90, 70 L.Ed.2d 262 (Nov. 30, 1981); People ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater et al., 128 Cal.App.3d 937, 180 Cal.Rptr. 728 (Feb. 18, 1982) (decision on remand) and People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 165 Cal.App.3d 278, 211 Cal.Rptr. 501 (Mar. 7, 1985) (decision on attorney's fees on appeal).

7. Case No. 28-12-14 was filed on December 20, 1977, after the jury returned its verdicts in Case No. 25-65-30 that 11 films were obscene under California law. The titles of the 24 films in Case No. 28-12-14 are listed in the Complaint in Case No. 45-80-37 at pages 2-3 (Surveillance Code No. 25 through 36). No motion for preliminary injunction was made in

Case No. 28-12-14. Subsequently, Case No. 28-12-14 was consolidated for trial with Case No. 29-92-83.

8. The titles of the 26 films in Case No. 29-92-83 are listed in the Complaint in Case No. 45-80-37 at page 4 of Exhibit 3 (Surveillance Code No. 1-78 through 13-78). On November 2, 1978, Orange County Superior Court Judge Richard D. Hamilton granted a preliminary injunction against exhibiting the 26 films after a four-day hearing. The preliminary injunction was affirmed in People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 101 Cal.App.3d 296, 161 Cal.Rptr. 562 (Jan. 22, 1980, hearing denied May 7, 1980).

9. The titles of the 46 films in Case No. 31-55-93 are listed in the Complaint in Case No. 45-80-37 at page 5 (Surveillance Code No. 14-78 through 23-78) at page 7 (Surveillance Code No. 13-79

through 16-79) and at pages 7-8 (Surveillance Code No. 22-79 through 30-79). On January 24, 1980 after a 9-day hearing, Orange County Superior Court Judge Lester Van Tatenhove granted a preliminary injunction against exhibiting 46 films and 8 previews. The preliminary injunction was affirmed in People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 118 Cal.App.3d 863, 173 Cal.Rptr. 476 (Apr. 16, 1981).

10. The above lawsuits were filed at the direction of the City Council, which acted by formal resolution after considering evidence in the form of the following time and motion studies and continuities which had been prepared from surveillances of films exhibited at the Mitchell Brothers' Santa Ana Theater:

CASE NO. AND FILMS CONSIDERED	RESOLUTION NO.	DATE OF ACTION
25-65-30 13 programs (25 films) Time-motion studies	76-134	10/26/76
28-12-14 12 programs (24 films) Time-motion studies	77-144	12/12/77
29-91-83 6 programs (12 films) Time-motion studies/continuities	78-131	10/02/78
31-55-93 14 programs (28 films) Time-motion studies/continuities plus judicial decisions in 2 State Courts and 1 Federal Court proceedings	79-98	06/18/79

11. In the first three of the above four cases, the City Council acted upon photographic evidence in the form of time and motion studies of the films which had been exhibited to the date of the City Council's action. In the last case (Case No. 31-55-93), the City Council in Resolution 79-98 also had before it the Findings of Fact and Conclusions of Law in Case No. 25-65-30 that 11 films were obscene, the preliminary injunction of Orange County

Superior Court Judge Richard D. Hamilton that the 26 films in Case No. 29-91-83 were obscene, and the verdict of the federal jury in the copyright case that five films ("Behind the Green Door", "Resurrection of Eve", "Inside Marilyn Chambers", "Autobiography of a Flea" and "Sodom and Gomorrah") which the Mitchell Brothers had produced, directed, distributed and exhibited at the Theater were obscene under federal law.

12. On Monday, May 6, 1985, the Santa Ana Council adopted Resolution No. 85-58 and ordered the City Attorney to take further legal action to enjoin and abate the motion picture films being exhibited at the Mitchell Brothers' Santa Ana Theatre from the date of its opening in 1975 including the films which were then being exhibited on the date Resolution No. 85-58 was adopted. Pursuant to that directive, People of the State of California ex rel.

Edward Cooper, City Attorney for the City of Santa Ana, California; City of Santa Ana, a Municipal corporation, Plaintiffs v. Mitchell Brothers' Santa Ana Theatre, et al., No. 45-80-47, was filed on May 9, 1985.

13. The City Attorney now brings this motion for a preliminary injunction as to the motion picture films which are presently being exhibited at said theater during the weeks subsequent to February 3, 1986. Subpoenaed 35MM prints, used in the projection of such motion picture films, will be offered in evidence for the Court's viewing at the hearing on Plaintiff's Motion for a Preliminary Injunction. Video tape copies of such films will also be offered as secondary evidence.

14. I further say that I have been the attorney of record in the above-described lawsuits and have been in overall charge of the weekly surveillances at the Mitchell Brothers' Theatre since the filing of the

first lawsuit on November 27, 1976. The content and character of the three features shown at this location during the past 10 years is the same. In particular, the content and character of the motion picture films shown on March 19, 1986, is the same as the motion picture films which were surveilled at the same location and autoptically recorded on previous occasions, and subsequently judged to be obscene under California law at two preliminary injunction hearings before Orange County Superior Court Judge Richard Hamilton and Lester Van Tatenhove in Case Nos. 29-91-83 and 31-55-93, and at four Court trials before Orange County Superior Court Judge Marvin Weeks in Case No. 25-65-30 (eleven [11] motion picture films judged obscene), and before Orange County Superior Court Judge Claude M. Owens in Case No. 29-91-83 (six [6] motion picture films judged obscene) and in Case No. 31-55-93 (thirty-four [34] motion picture films and eight [8] previews

judged obscene). The films and previews which were judged to be obscene in the three court trials to date are:

Case No. 25-65-30

(1) Sodom and Gomorrah
(2) Behind the Green Door
(3) Inside Marilyn Chambers
(4) Autobiography of a Flea
(5) Sensations
(6) Teenage Fantasies
(7) Teenage Cruisers
(8) French Classmates
(9) Love in Strange Places
(10) Story of Joanna
(11) Hungry Mouth

Case No. 29-91-83

(1) Teenage Pajama Party
(2) Breaker Beauties
(3) A Formal Faucett
(4) Kinky Tricks
(5) Deep Throat
(6) Devil in Miss Jones

Case No. 31-55-93

(1) The Last Fox Trot In Burbank
(2) Reflections
(3) Lollipop Palace
(4) A Taste of Sugar
(5) The Erotic Adventures of Candy
(6) Moonshine Girls
(7) Slippery When Wet
(8) French Shampoo
(9) Honey Cup
(10) Anita, The Swedish Nymphet
(11) Candy Stripers
(12) My Wife The Hooker
(13) Confessions of Linda Lovelace

(14) Visions
(15) Once Over Nightly
(16) Salon D'Amour
(17) Hot Cookies
(18) Mash'D
(19) Barbie's Fantasy
(20) C.B. Mamas
(21) Resurrection of Eve
(22) Dear Pam
(23) Slave of Pleasure
(24) It Happened in Hollywood
(25) Prisoner of Love
(26) Abduction of Lorelei
(27) Made in France
(28) Born Erect
(29) Another Love-Another Place
(30) Unwilling Lovers
(31) Come With Me My Love
(32) Souperman
(33) Teen Pony Girls
(34) One Of A Kind

Eight Previews:

(1) Candy Goes to Hollywood
(2) Hungry Young Women
(3) Candy Stripers
(4) A Taste Of Sugar
(5) Visions
(6) French Shampoo
(7) Blonde Velvet
(8) The Erotic Adventures of Candy

In no case, in either the two injunction hearings or the four trials to date, is there a judgment of a trialcourt that any one of the films which have played at the Mitchell Brothers' Theatre is not obscene. All of the judgments, to date, have been

that the films viewed by the Court and tried on the merits are obscene.

RE THE DEFENDANTS' OBJECTION TO THE INTRODUCTION OF EVIDENCE OF "OBSCENITY" UNDER THE "BEST EVIDENCE" RULE AND THE TIME AND MOTION STUDY AS SECONDARY EVIDENCE ISSUE

15. At the trial, after lengthy arguments, Judge Weeks admitted the time and motion studies in Case No. 25-65-30 as secondary evidence and granted a stay of the trial to permit the Mitchell Brothers to test that ruling in the Court of Appeal by prerogative writ in Mitchell, et al. v. Superior Court, 4 Civ. 19503. After the Court of Appeal denied the writ on October 28, 1977, and a Petition for Hearing was denied by the California Supreme Court on November 2, 1977, the defendants voluntarily produced 17 of the films in evidence and then refused to bring in the rest. Judge Weeks then reversed his ruling and excluded Plaintiff's "secondary evidence" as "prejudicial."

16. In Case No. 31-55-93, Judge Van Tatenhove admitted the time and motion studies as secondary evidence at the hearing on the preliminary injunction. At the trial, however, Judge Owens excluded the time and motion studies as secondary evidence, but admitted the same as foundational evidence to authenticate the videotape cassettes, which had been purchased upon the open market, as "copies" of the films which had been exhibited at the Mitchell Brothers' Santa Ana Theatre.

THE TRIAL OF CASE NOS. 28-12-14, 29-91-83 AND 31-55-93

17. The trial of Case Nos. 28-12-14 and 29-91-83 was held in Department 17 (Judge Owens) on June 2, 3, 8, 15, 17, 18, 22, 23, 25, 29, 30 and July 1, 1981. The Mitchell Brothers moved for a nonsuit pursuant to Civil Code, Sections 581 and 631.8 as to Case No. 28-12-14 and as to all of the films in Case No. 29-91-83, except the

six */ which were viewed by the Court. The Court granted the nonsuit as to Case No. 28-12-84 on the ground that since no evidence of the motion picture films or secondary evidence had been received, there was no evidence of obscenity and, without such evidence, the Court could not make an adjudication. The Court denied the motion for nonsuit as to Case No. 29-91-83.

18. On July 31, 1981, Judge Owens

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*/ In adopting Resolution No. 78-131, which authorized Case No. 29-91-83, the City Council considered and acted upon time and motion studies of 6 programs (12 films and assorted previews). Thereafter, Judge Hamilton considered 13 programs (26 films and assorted previews) which included 8 films which were subpoenaed after the preliminary injunction hearing had been set ("Teenage Pajama Party," "Breaker Beauties," "Kinky Tricks," "A Formal Faucett," "Roller Babies," "Summer of Laura," "Deep Throat," "Devil in Miss Jones") and 18 time and motion studies which had been prepared from films exhibited before such hearing date). At the hearing on the preliminary injunction, the Parties stipulated that there was no substantial difference between the 8 films in the four programs which were viewed by Judge Hamilton and the 18 films in the other nine programs. Judge Owens, however, refused to take judicial notice of the stipulation nor would he view the two films "Roller Babies" or "Summer of Laura," which had been the subjects of one of the controversies in the appeal of Case No. 25-65-30.

filed his "Memorandum of Intended Decision" in Case Nos. 28-12-14 and 29-91-83. In that decision, he ruled as follows:

(1) The six films which were viewed by the Court were obscene beyond a reasonable doubt. The films were hard-core pornography.

(2) Because the advertising and public exhibition of the films constituted a public nuisance, the City was entitled to an injunction.

(3) License revocation was denied because:

(a) None of the films upon which Resolution 78-131 was based were received in evidence. There could be no judicial determination. Without such determination the purported revocation could not stand.

(b) The resolution applied the wrong standard. Because the wrong standard was applied, the City had not made a valid finding to support a license revocation.

(c) Even if the resolution were valid, the purported license revocation constituted a prior restraint.

(4) There was no difference between judicial restraint and legislative restraint.

(5) The Court noted but would not follow Associate Justice Burke's dissent at footnote 4 in Perrine v. Municipal Court, 5 C.3d 656, 668.

(6) Plaintiff was entitled to costs.

19. The trial of Case No. 31-55-93 was held in Department 17 (Judge Owens) on September 1, 2, 3, 8, 10, 14, 15, 16, 17, 21, 22, 23, 24, 1981, and October 15, 19, and 20, 1981. The trial facts in Case No. 31-55-93 differed substantially from the trial facts in Case Nos. 28-12-14 and 29-91-83.

20. In Case No. 28-12-14, no films were received in evidence and only the time and motion studies and continuities of 12 programs were before the trial court. In Case No. 29-91-83, Judge Hamilton viewed 8 films which had been subpoenaed (programs 10-13) subsequent to the action by the City Council and there had been a stipulation that the other films (programs 1-9) were substantially similar to the eight which

had been viewed by Judge Hamilton. In contrast, Judge Van Tatenhove received in evidence and viewed, in addition to the time and motion studies and continuities for programs 1-14 (28 films) which had been before the City Council, 15 films and 8 previews (programs 15-23) which had been subpoenaed for the hearing on the motion for a preliminary injunction which was set subsequent to the City Council's action. In granting the preliminary injunction, Judge Van Tatenhove ruled the time and motion studies and continuities for programs 1-14 were admissible in evidence against the Mitchell Brothers' "best evidence" objection. That preliminary injunction had been affirmed upon the appeal which was final. Overruling a "law of the case" objection, Judge Owens refused to follow that ruling and admit the copies, but allowed the time and motion studies in evidence to "authenticate" the videotapes as "copies" upon which

he thereafter ruled. Judge Owens also granted the City's request that the Court take judicial notice of Finding of Fact #19 in Case No. 25-6-530, Plaintiff's Exhibit 15 (testimony of Dr. Anchell and Dr. Van den Haag re "harm" to the City).

21. On October 20, 1981, Judge Owens announced his "Intended Decision" from the bench in which he ruled that all of the films which had been viewed by the Court either in 35mm or videotape cassette form were obscene under California law.

22. By an order filed on January 22, 1982, Judge Owens approved a stipulation between the Parties and granted a stay of proceedings re settlement of the proposed findings of fact and conclusions of law in Case Nos. 28-12-14 and 29-91-83 (consolidated), and Case No. 31-55-93, pending the appeal in Case No. 25-65-30. A hearing on the settlement of proposed findings of fact and conclusions of law in those cases has

been set by Plaintiffs for May 6, 1986, at 9:00 a.m. in Department 18.

I declare under penalty of perjury that the foregoing is true and correct and was executed on this 25th day of March, 1986, at Sun Valley, California.

James J. Clancy
Attorney for Plaintiff

APPENDIX "C"

Partial Reporter's Transcript for July 31, 1986 in People ex rel. Gow, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theatre et al., Nos. 28-12-14, 29-91-83 and 31-55-93, on the issue of "prevailing party" pursuant to Civil Code Section 3496, before Orange County Superior Court Judge Claude M. Owens.

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners at page 22, line 22.

Partial Reporter's Transcript for July 31, 1986 in People ex rel. Gow, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theatre et al., before Orange County Superior Court Judge Claude M. Owens.

Santa Ana, California, Thursday, July 31, 1986; 9:00 a.m.

(Whereupon all parties were then and there present, the following proceedings were had, to wit:)

(Partial Transcript.)

The Court: This is the Mithcell (sic) Brothers case.

(Partial Transcript.)

The Court: Regarding the objections to the proposed judgment for attorney's fees and the three cases pending, the Court rules as follows:

Case number 28-12-14, the Defendants are entitled to attorney's fees under Civil Code section 3496 as the prevailing

party.

Under cases 29-91-83 and case 31-55-93 neither side is entitled to fees. Neither side prevailed.

Miss clerk, that will be the extent of your minute order.

Now, the Court will explain its reasons, and the reporter will make a transcript of these remarks and they will then be filed in the file.

The rulings are based on these reasons.

Generally, attorney's fees may be recovered only when agreed to or when allowed by statute (CCP Section 1021; Nasser vs. Superior Court, 156 CA3 52, 56; 1 Witkin, Procedure, 3rd Edition, 151). In these cases there is no agreement for fees.

Of three possible statutes, only Civil Code 3496 is relevant.

CC 1717 is not relevant because these cases are not contract cases -- the prerequisite for that section.

C.C.P. 1021.5 is not relevant because no significant benefit is conferred on a large class of persons by the rulings in defendant's favor -- the prerequisite of subsection (a) of that section (Woodland Hills Retirement Association vs. City Council, 23 C3 917, 940; Pacific Legal Foundation vs. California Coastal Commission, 33 C3 158, 166; See the dissent in Press vs. Lucky Stores, 34 C3 311, 325, and qualification at footnote 7, of the majority's "assumption").

The benefit conferred by the rulings in defendants' favor was to permit the moving picture theater to continue to show obscene films. This is not a "significant benefit to a large class of persons."

C.C. Section 3496 does apply. That section requires that a party prevail to be entitled to fees.

In case number 28-12-14, defendants prevailed. The case was dismissed on motion for nonsuit for lack of evidence (see Palmer vs. Agee, 87 CA3 377).

In cases number 29-91-83, and 31-55-93, neither side prevailed, for both sides only partially recovered what they sought (Nasser, supra, page 58; See Reid vs. Valley Restaurant 48 C2 606).

Plaintiff succeeded in having enjoined the showing of many films. This took most of the trial time. Defendants succeeded in having the prayer for license revocation denied.

Which aspect was more significant would depend on one's point of view.

Gentlemen, thank you.

APPENDIX "D"

Orange County Register News articles dated Sunday, August 17, 1986, reporting on City of Santa Ana Mitchell Brothers' Santa Ana Litigation, entitled: "After 10 years, Santa Ana questions its fight." And "The Mitchell Brothers: From Small-Town U.S.A. to Big-Time Pornography."

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners, at page 24, line 18 herein).

A4 The Orange County Register Sunday, August 17, 1986

After 10 years, Santa Ana questions its fight

By Anita Snow
The Register

SANTA ANA — Ten years and more than $300,000 later, some City Council members are beginning to wonder if they haven't been wasting their time trying to shut down the X-rated Mitchell Brothers Theater.

"I'm ready for us to do something about this," City Councilwoman Patricia McGuigan said. "I feel we've been spending a lot of money on this and I don't think anything is coming of this.

"I'm beginning to think we're pouring water down an empty hole."

Council members on Monday will get a chance to re-evaluate their earlier support of a plan to revoke the theater's business license.

During a closed session, the group is scheduled to discuss an Orange County Superior Court judge's ruling earlier this month that Santa Ana must pay the theater's legal fees, estimated at $1.2 million, in a 1976 case.

Later that evening, a group of Santa Ana residents is scheduled to present council members with a petition encouraging continuance of the legal battle to kick the Mitchell Brothers out of town.

"We're very concerned about it," said Gloria Turtenwald, who is among the residents who live north of the theater planning to show up for the Monday night City Council meeting.

"We think this could be a test case and we don't want them to give it up," Turtenwald said.

Some council members' concerns that too much money has been spent and some residents' fears that the battle may be dropped stem from an Aug. 6 Orange County Superior Court ruling in which Santa Ana was declared the loser.

Judge Robert J. Polis ordered Santa Ana to pay Mitchell Brothers' legal fees they have incurred fighting a lawsuit the city filed in 1976 in hopes of closing the theater.

Although Mitchell Brothers' attorneys have estimated that those fees could run as high as $1.2 million, Polis must later approve that figure.

"Those kinds of dollars just aren't around," Councilman Robert Luxembourger said. "There's no point in spending that kind of money on creating case history."

Like McGuigan, Luxembourger said that ruling has forced him to begin to rethink his earlier support of the court battle. Earlier this year, even before the ruling, Vice Mayor P. Lee Johnson said he was concerned too much money and time had been spent on the case.

Mayor Dan Griset and Councilmen Wilson Hart and Dan Young have declined to comment on the ruling until they have a chance to discuss it with City Attorney Ed Cooper.

Only Councilman John Acosta has said he is committed to continuing the battle against the Mitchell Brothers, regardless of cost. "Morality does not have a price," Acosta said. "We must protect the moral values of the community."

To wage its war, the city contracted with attorney James Clancy in 1976. Clancy has said he would appeal the most recent ruling and is worried the city may give up the battle.

"The Mitchell Brothers' attorneys just made that ($1.2 million figure) up for the headlines," Clancy said. "They are just trying to scare the city into changing its mind."

Santa Ana already has spent $308,000 during the past decade to fight Mitchell Brothers, City Attorney Ed Cooper said.

Clancy estimated that about 60 percent of that figure has gone to pay for "out-of-pocket expenses," such as the purchase and processing of film used by a retired Los Angeles police officer to take pictures surreptitiously of the theater's movies to provide evidence in the 10-year court battle.

Clancy said he received the rest to represent the city in court. He filed five lawsuits against the theater between 1976 and 1985 and has filed one a week for each new film shown there since February.

The city initially paid Clancy $25 an hour in 1976 and is paying him $50 an hour today, Cooper said.

Council members said that any decision they make on the Mitchell Brothers case could be a politically dangerous one. They worry that some taxpayers will think they are spending too much money if they continue the battle and offend the moral sensibilities of others if they decide to throw in the towel.

"It's a sticky political situation." McGuigan said. "You're either for pornography or you're for wasting the taxpayers' money.

"Which is worse?"

Despite the political risks, two men who were on the City Council when the battle first started a decade ago think its time the current council members re-evaluate their former support of the battle to shut down the theater.

"It's astonishing to me how they've gone on and on," Vern Evans said. "When we first started, we felt confident that the judges and courts would be in support of trying to stop all this nonsense. It just didn't work out that way."

Gordon Bricken, who was among those who marched in protest outside the theater in late 1975 and early 1976, said: "They've been doing it for so long, I don't think anyone, including the council, the courts and everyone else, is sure why they're even doing it anymore.

It's time, Bricken said, that the city give up the battle.

"It has lasted 10 years only because we've failed to be successful."

The Mitchell brothers: From small-town U.S.A. to big-time pornography

By Gregg Zoroya
The Register

SAN FRANCISCO — Missy Manners blinks her brown eyes attentively, shifting her figure beneath a clinging, transparent gown, and strains to answer over the din of an opening-night celebration of pornography.

"I would not work with anyone else in the adult film industry besides the Mitchell brothers," said the 24-year-old former Senate page and campaign worker for President Reagan.

The bosomy right-winger's decision to bare all for Jim and Artie Mitchell's latest porn production was a national news item. It doubled as lucrative publicity for the brothers from Antioch, who have the city of Santa Ana with its back to the wall.

While the television cameras ogled her arrival for the premiere earlier this month at the Mitchells' O'Farrell Theater, she began blasting Attorney General Edwin Meese and his Commission on Pornography. The brothers looked on like proud papas.

It wasn't just the publicity. She was thumbing her nose at the ruling class and that has been a popular pastime for the two middle-aged siblings who are among the most successful pornographers in the country.

The Mitchells' non-conformity has served them well in their never-ending task of defending their vocation in courtrooms from Texas to Santa Ana, where their X-rated theater has been under legal siege by the City Council since 1975.

In his rimless glasses, the balding, mustachioed Jim, 42, is the perennial civil dissenter, who forged a steely irreverence and rock-hard resistance to established authority during his '60s-protest years at Berkeley. He and his younger brother by two years, who shares a similar, if less heady version of dissidence, are remnants of the flower generation.

Perpetual protesters though they may be, Jim and Artie also are an American success story. The two are products of small-town U.S.A., who parlayed a $10,000 loan in 1969 into a porn empire that has generated millions. (They're evasive on specifics.) The Mitchells regularly outspend their competitors to make their movies and they are unafraid at dropping a similarly sized bundle to stop legally the ripoff artists and to fight city halls.

"We've always been in an independent mode from the rest of pornography," Jim said. "We don't think we're any better than anyone else. But we always cared about what we were doing."

Apart from the business, the Mitchells contribute to a variety of San Francisco charities, including Save the Cable Cars. Proceeds for the most recent premier went to a hospice program for victims of AIDS.

BEST A

When they're not on an occasional holiday with their children, they fish commercially each morning near the Golden Gate Bridge and tend to the pornography in the afternoon. Artie's a Democrat; Jim's a Libertarian. Both drive a Mercedes.

They share a strong love for their children, 10 in all, and they have a unique appreciation and close reliance upon one another as brothers.

"Actually, he's a good brother. Took me everywhere. Took good care of me," Artie said.

"We're 50-50 partners," Jim said.

They don't fit the stereotype of pornographers. There are no gold chains and polyester suits. Both are a compact 5 feet 9 inches and they are comfortable in denim, cotton pullovers and running shoes. For the gala event at the O'Farrell theater, Artie opted for a conservatively cut gray suit, white shirt and purple tie. Jim stayed casual.

Artie, with his neatly trimmed beard and deepening crow's feet, is more weathered and the freer spirit of the pair. He starred in their first porn film (the male lead failed to show), has shed two wives while Jim is on his second, and outlasted his older brother on opening night, partying to 6 a.m.

"They are very fun and they're very bright," Manners said, sipping champagne from her perch atop a carpeted dance pedestal in the theater's garishly decorated Green Door room.

Jim and Artie plan to market her schoolgirl exuberance in their latest release, "Behind the Green Door — the Sequel," in every sex-hungry corner of the land, including Santa Ana.

"She doesn't have that glossy, hard look," said Jim of his new star, who appears in a fleshy scene with three men on a trapeze and who later encounters a hard-breathing satyr, a half-man, half-goat.

The movie is billed as a sequel to the brothers' fabulously successful original "Behind the Green Door," which starred Ivory Snow detergent-box cover girl Marilyn Chambers. The new version has a novel theme: safe sex. Virtually every intimacy is separated by some form of latex.

"It's supposed to be a primer for other pornographers to follow," Jim said.

"The film has a decidely clinical flavor with all the squeaky rubber," noted Chronicle critic Gerald Nachman, in what was not the only negative review of the new release. "I've been more turned on at Walgreens."

But Manners, whose real name is Elisa Florez, was undeterred.

"I hope to come down to Santa Ana and do a premier like this," she said, surveying the eclectic mixture of Bay-area citizenry, a mixture of purple-haired punks and pin-striped gentry nibbling pate and erotic pastries.

Then she smiled wickedly.

"We'll have a great ... show."

The remark, containing an expletive, was borne of confidence that came easily as she lounged on her opening night in the brothers' citadel of seduction.

This emporium of erotica on O'Farrell Street — with its maze of entertainment rooms — offers X-rated films, striptease acts and simulated sex shows for a $25 entry fee during evening hours.

After 18 years of nearly uninterrupted operation — despite on-again, off-again run-ins with City Hall — the brothers have earned a grudging acceptance by many in the city.

"We sort of take them for granted now. They're part of the scenery ... part of the cultural activities," San Francisco Examiner columnist Herb Caen observed after dropping in on the premier.

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"(It's) the Opera House, Symphony Hall, the Mitchell Brothers, in that descending order," he mused, "although the (art) museum's in there somewhere."

Such a reputation doesn't wash in Santa Ana, where the brothers are known by only their last name, their dirty-movie theater at the Honer Plaza shopping center and the city's current legal war — its latest strategy is filing a lawsuit per week — aimed at closing them down.

"What happens there (in Santa Ana) is very convoluted. It doesn't make any sense," Jim said. "We were warned when we went into Santa Ana (in 1975). It basically has a real tough reputation, as tough as some of the Southern towns in the early desegregation batties.

"It's good business is why we went to Santa Ana and stayed," he added. "Santa Ana runs the risk of becoming either a model (at combating pornography) or the laughing stock of the nation on how not to do it."

It's a personality trait of the older brother that he launches into a sarcastic analysis on those government authorities who label their craft "obscene" and the brothers "smut kings."

"We're at the very bottom. We're the muck that they have to get rid of," he said.

It's like he's back at Berkeley, fist still raised, fighting for the cause. Only this time, it isn't anti-war, it's pro-First Amendment and its guarantee of free expression.

"If they can get us, I'll guarantee you (in the press), you're not far behind," he said. "We're going to go on the (legal) offense only because we know there's nobody waiting in the wings to save America."

And what of the current administration with its porno-fighting attorney general and Supreme Court nominees?

"They've got to be careful or they're really going to wreck a couple of hundred of years of Constitution," Jim said. "When you take anything, your court or any of your government, and you swing it over to one side it goes to (expletive). They're too greedy. They go, 'We want it all,' and you don't get it all."

James Lloyd and Artie Jay Mitchell believe they have something to lose.

They were born of Scottish, Irish and American Indian heritage (Choctaw and Cherokee). They were the only children of an elementary school teacher and a professional gambler who skirted the law and spent time on a Texas chain gang before he came west. Georgia Mae was 19; Bob was 35.

Dad taught the boys a few hard lessons, such as there's no free lunch; mom took them to church — a fundamentalist Assembly of God chapel in Antioch.

"By the time we were 9 or 10, they couldn't make us go," Jim said.

Both parents left them with honest, uninhibited notions about sex.

Artie is convinced it's one secret to their pornographic success.

"I don't feel guilty about sexuality or pictures of it," he said. "I realize there are people ... who get a terrible knot in their stomach that they can never get rid of and I feel sorry."

Their father died in 1973 of a heart attack. Their mother is retired and lives near Sacramento.

"Our family was always tight," Jim said. "Whatever we did would be fine, as long as you called home."

Antioch was a village of only a few thousand in those days and there was one sure way of escape. Both boys joined the Army, Jim

first and Artie after he got an associate degree at Diablo Valley College in nearby Concord.

When Jim was discharged in the early '60s, he enrolled at the University of California, Berkeley, a political science major with a minor in film.

In the midst of the Vietnam anti-war protest during his senior year, Jim joined a student body strike and left school.

"I remember the last day, they (the police) were chasing us with their batons and we'd been throwing rocks at 'em to get them started. We had taken over the administration building, shut 'em down. We were anti-war, the revolution was now."

Viewing the televised carnage in Vietnam, Jim had little difficulty in cultivating an irreverent dislike for government.

He took a job part-time at a San Francisco theater showing black-and-white adult movies.

"In those days ... you didn't see too much mixing up in it," he recalls. "That gave us a little idea that anybody could do a better job at this."

Who was going to tell them it was morally wrong, he asked, a government knee-deep in Vietnam?

When Artie was discharged after serving much of his tour in West Germany, he and Jim enlisted a small group of Antioch high-school chums and started the business. The Mitchell Brothers' O'Farrell Theater, at 895 O'Farrell St., opened on July 4, 1969. He was 26; Artie, 24.

In the beginning, improving the art form was simple.

"All the girls in the movies were hippies and they all had dirty feet," Jim recalled. "The big thing became to have a girl without dirty feet."

"(So) we would have her wash her feet," Artie said.

They say they've always drawn the line at child porn, bestiality and violence. But there was one area they embraced early on: hard-core sex.

"We knew the people wanted that," Artie said. "Business was phenomenal."

Despite intermittent raids by San Francisco police, the brothers undertook a hectic pace of producing two X-rated films every week.

They would ultimately introduce or employ such porno stars as Erica Boyer, Harry Reems, John Holmes, Annette Haven and Ginger Lynn.

(Even porn queen Traci Lords participated in a 1985 Mitchell brothers' film. The young star made national news when it was revealed she was under age. The brothers quickly trimmed her eight-minute appearance from the movie when the news broke.)

By the time they made the original "Behind the Green Door" in 1973, it was their 332nd production. The $86,000 film is estimated to have earned $25 million since its release in 1973.

Not much of that filtered back to the brothers, they said. Their on-again, off-again business sense and never-ending legal costs have combined to keep them from becoming millionaires.

"I've never seen them wanting for money," business associate Jeff Armstrong said.

But, adds business manager Vince Stanich, "A lot of money has come in and a lot has gone out."

The Mitchells tried to avoid paying taxes on the huge income spawned by the orginal "Green Door" by plowing proceeds into new productions. They spent a record $450,000 on "Sodom and Gomorrah" and created a flop.

In the late '70s, the Mitchells reduced their string of theaters from

11 to four (two in San Francisco, one in Haywood and one in Santa Ana), stopped making films and began relying on video-cassette production, film distribution and commercial fishing.

"Sometimes it's real nice out there," Artie said of fishing off the coast for halibut.

"It keeps you alive for the fight," Jim said.

During the early '70s, when the bootleggers tried to capitalize on the success of such Mitchell brothers' films as "Green Door," the men chose a tactic that was unheard of in pornography: copyright.

After six years of litigation, federal appeal judges granted them their copyright in 1979 and the U.S. Supreme Court left the decision alone. The Mitchells had made case law.

"That's a great one," Jim said. "When that one came in we all had 30 seconds of silence."

There also were legal upsets. When a San Francisco judge found them in contempt of court in 1982 and sentenced them to jail for allowing their dancers to engage in prostitution at the O'Farrell, the brothers appealed. The case is before the state Supreme Court, housed just four blocks from the O'Farrell theater.

With the millions of videocassette recorders in American homes today, the brothers started making movies again last year and the "Green Door" sequel is their second major comeback production.

They want to bring the film to Santa [illegible] where their lease runs out on [illegible], 1990. The brothers see renewal as doubtful. The notion is enough to spark the Mitchells into a little stand-up comedy.

Artie: "We'll probably still be there, going about our business of collecting the millions they owe us (in attorneys' fees)."

Jim, (with exaggerated effect): "Ha, ha, ha. Yeah, we'll take the Greyhound down, right?"

Artie: "Yeah, I'll volunteer to come down and see how our case is going ... we're not about to walk away at this point."

Jim: "We'll be there with walking canes."

Artie: "I wish they had a few more restaurants in Santa Ana."